

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
WaveDivision Holdings, LLC)	CSR 6395-D
Wave Division IV, LLC)	
)	
Petition for Special Relief)	

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2007

Released: March 6, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. WaveDivision Holdings, LLC (“WaveDivision”), sole member of Wave Division IV, LLC (the “parent”), has filed a Petition for Special Relief (“Petition”) in which it seeks a waiver of the Commission's rules to the extent necessary to establish cable rates for its Port Orchard, Washington, cable system¹ in accordance with the Commission’s small system cost-of-service methodology.² No opposition to the Petition was filed.³ We grant the Petition upon a finding that a waiver of the Commission’s rules for four years is in the public interest.

2. In the 1992 Cable Act, Congress directed the Commission to adopt rate regulations with reduced administrative burdens and compliance costs for cable systems with 1,000 or fewer subscribers.⁴ The Commission’s benchmark and cost-of-service ratemaking methodologies generally applicable to cable operators include various measures aimed specifically at easing regulatory burdens for these smaller

¹ The communities in the Port Orchard, Washington, cable system and the related community unit identifiers are Bremerton (WA-0229), Bremerton Naval Complex (WA-0462), Bangor Naval Submarine Base/Keyport Naval Undersea Warfare Center (WA-0461 and WA-0833), Kitsap County (WA-0249, WA-0311, WA-0313, WA-0321, WA-0491, WA-0168), Mason County/South Shore Hood Canal (WA-0332 and WA-0335), Port Orchard (WA-0167), and Puget Sound Naval Shipyard/Jackson Park Housing (WA-0463), all in the State of Washington. Of these, only Bremerton and Kitsap County now regulate basic cable rates. Petition at 3.

² The small system cost-of-service methodology was adopted in the *Sixth Report & Order & Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995) (“*Small System Order*”).

³ We received the Petition on September 28, 2004, and, at our request, WaveDivision filed a letter herein dated July 7, 2006, which updates various data stated in the Petition. Letter from Emily A. Denney, Cinnamon Mueller, counsel for WaveDivision, to Marlene Dortch, Commission Secretary, dated July 7, 2006 (“2006 Letter”).

⁴ Cable Television Consumer Protection & Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (“1992 Cable Act”). See also 47 U.S.C. § 543(i).

systems.⁵ Subsequently, in the *Small System Order*, the Commission granted regulatory relief to additional systems.⁶ The *Small System Order* defined a small system as any system that serves 15,000 or fewer subscribers.⁷ The Commission recognized that systems with no more than 15,000 subscribers were qualitatively different from larger systems with respect to a number of characteristics, including: (1) average monthly regulated revenues per channel per subscriber; (2) average number of subscribers per mile; and (3) average annual premium revenues per subscriber.⁸ The magnitude of the differences between the two classes of systems as to these characteristics indicated that the 15,000 subscriber threshold was an appropriate point of demarcation for purposes of providing for substantive and procedural regulatory relief.⁹ Most forms of rate relief provided under the *Small System Order* and the Commission's rules are available only to those small systems that are owned by a small cable company.¹⁰ A small cable company is defined as one which serves a total of 400,000 or fewer subscribers over all of its systems.¹¹

3. In addition to adopting these categories of small systems and small cable companies, the *Small System Order* introduced a form of rate regulation known as the small system cost-of-service methodology.¹² In order to qualify for the regulatory relief afforded by the small system cost-of-service methodology, cable systems and companies must meet the size standards as of either the effective date of the *Small System Order* or, thereafter, on the filing date of the documents necessary to elect such relief.¹³

4. Cable systems that fail to meet the numerical definition of a small system, or whose operators do not qualify as small cable companies, may submit petitions for special relief requesting that the Commission grant a waiver of its rules to enable the systems to utilize the various forms of rate relief

⁵ See, e.g., *Report & Order & Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 (1993); *Second Order on Reconsideration, Fourth Report & Order, & Fifth Notice of Proposed Rulemaking*, 9 FCC Rcd 4119 (1994); *Fifth Order on Reconsideration & Further Notice of Proposed Rulemaking*, 9 FCC Rcd 5327 (1994); *Eighth Order on Reconsideration*, 10 FCC Rcd 5179 (1995).

⁶ *Small System Order*, 10 FCC Rcd at 7406 ¶ 25.

⁷ *Id.* at 7406 ¶ 25; see also 47 C.F.R. §§ 76.901(c), 76.934.

⁸ *Small System Order*, 10 FCC Rcd at 7408 ¶ 27.

⁹ *Id.*

¹⁰ *Id.* at 7407 ¶ 26. In 1996, Congress amended Section 623 of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (the "Communications Act"), to allow greater deregulation for "small cable operators," defined as operators that "directly or through an affiliate, [serve] in the aggregate fewer than 1 percent of all subscribers in the United States and [are] not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, Communications Act, § 623(m), 47 U.S.C. § 543(m). Pursuant to this amendment, the rate regulation requirements of Sections 623(a), (b) and (c) do not apply to a small cable operator with respect to a basic service tier that was the only service tier subject to regulation as of December 31, 1994, in areas where the operator serves 50,000 or fewer subscribers. See 47 C.F.R. §§ 76.901(f), 76.990.

¹¹ *Small System Order*, 10 FCC Rcd at 7406 ¶ 25, 7408 ¶ 28. A small system is deemed affiliated with a larger cable company if the company "holds more than a 20 percent equity interest (active or passive) in the system or exercises *de jure* control (such as through a general partnership or majority voting shareholder interest)." *Id.* at 7412-13, n.88 ¶ 36. See 47 C.F.R. §§ 76.901(e), 76.934.

¹² *Small System Order*, 10 FCC Rcd at 7418-28 ¶¶ 51-75.

¹³ *Id.* at 7413 ¶ 38.

available to small systems owned by small cable companies.¹⁴ The Commission stated that petitioners should demonstrate that they "share relevant characteristics with qualifying systems."¹⁵ Based on analysis of data available at the time, the Commission found that systems with fewer than 15,000 subscribers differ from systems with more than 15,000 subscribers with respect to the following characteristics:

- a) the average monthly regulated revenue per channel per subscriber is \$0.86 for systems with fewer than 15,000 subscribers and \$0.44 for systems with more than 15,000 subscribers;
- b) the average number of subscribers per mile is 35.3 for systems with fewer than 15,000 subscribers and 68.7 for systems with more than 15,000 subscribers; and
- c) the average annual premium revenue per subscriber is \$41.00 for systems with fewer than 15,000 subscribers and \$73.13 for systems with more than 15,000 subscribers.¹⁶

Other potentially pertinent factors include "the degree by which the system fails to satisfy either or both definitions, whether the system recently has been the subject of an acquisition or other transaction that substantially reduced its size or that of its operator, and evidence of increased costs (*e.g.*, lack of programming or equipment discounts) faced by the operator."¹⁷ If the system fails to qualify for relief based on its affiliation with a larger cable company, the Commission will consider "the degree to which that affiliation exceeds our affiliation standards, and whether other attributes of the system warrant that it be treated as a small system notwithstanding the percentage ownership of the affiliate."¹⁸ The Commission specifically stated that this list of relevant factors was not exclusive and invited petitioners to support their petitions with any other information and arguments they deemed relevant.¹⁹

II. THE PETITION

5. WaveDivision seeks a waiver of our rules so that the rates for its Port Orchard system may be set in accordance with our small system cost-of-service methodology. WaveDivision states that its parent's cable systems have fewer than 82,000 subscribers, which qualifies the parent as a "small cable company" as defined in the *Small System Order*.²⁰ It acknowledges that it serves 23,282 subscribers, which is more than the 15,000 subscribers we have set as the standard for small systems,²¹ but argues that

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 7408 ¶ 27.

¹⁷ *Id.* at 7412 ¶ 36.

¹⁸ *Id.* at 7412-13 ¶ 36 (footnote omitted).

¹⁹ *Id.* at 7413 ¶ 36.

²⁰ 2006 Letter. This number of subscribers and other measurements submitted by WaveDivision were roughly as of May 31, 2006.

²¹ 2006 Letter.

its system continues to exhibit other small system characteristics for which the Commission established a special relief mechanism to extend application of small system rate relief.²² WaveDivision also states that the public policy goals underlying the *Small System Order*, as well as considerations of basic fairness, compel an extension of the waiver.²³

6. WaveDivision provides information in support of its assertion that its Port Orchard system shares relevant characteristics with qualifying small systems. First, WaveDivision asserts its cable system has monthly regulated revenue per channel per subscriber which resembles that of a small system.²⁴ The system averages \$0.71 per channel per subscriber,²⁵ which is much closer to the average figure for small systems (\$0.86) than it is to the average figure for large systems (\$0.44). The Port Orchard cable system's current figure is nearly identical to the per channel per subscriber figure (\$0.67) for the last system to which we extended small system status.²⁶

7. Second, WaveDivision states that the Port Orchard cable system's average number of subscribers per mile resembles that of a small system.²⁷ The system has an average of just 22.9 subscribers per mile,²⁸ which is considerably less than the average for small systems (35.3) and nowhere near the average for large systems (68.7). WaveDivision's current figure for subscribers per mile is less than the figure (27.7) for the last system to which we extended small system status.²⁹

8. Third, WaveDivision states that the Port Orchard cable system's average annual premium revenue per subscriber is not unduly high.³⁰ The system has an average annual premium revenue of \$45.78.³¹ This figure is much closer to the average premium revenue for small systems (\$41.00) than it is to the same figure for large systems (\$73.13). The Port Orchard system's revenue figure is also lower than several systems to which we have granted small system status.³²

9. WaveDivision's filings also show that its Port Orchard cable system has fewer subscribers today than in 2004.³³ WaveDivision furthermore argues that a grant of the requested rate relief would serve the public interest by protecting a small cable operator from the substantial costs of traditional rate regulation.³⁴ Moreover, WaveDivision states, it cannot achieve economies of scale

²² Petition at 4, 6-7.

²³ *Id.* at 8-9.

²⁴ *Id.* at 6.

²⁵ 2006 Letter.

²⁶ *Northland Cable Television, Inc.* ("Northland"), 19 FCC Rcd 2762, 2765 (2004) ¶ 6.

²⁷ Petition at 6-7.

²⁸ 2006 Letter.

²⁹ *Northland*, 19 FCC Rcd at 2765 ¶ 7.

³⁰ Petition at 7.

³¹ 2006 Letter.

³² *Alexcom, L.P.*, 13 FCC Rcd 5848, 5851 (1997) ¶ 9 (\$65.00); *Prestige Cable TV, Inc.*, 12 FCC Rcd 11513, 11516 (1997) ¶ 8 (\$57.00); *Lake Cablevision (Winder), Inc.*, 12 FCC Rcd 11473, 11476 (1997) ¶ 8 (\$53.80).

³³ 2006 Letter (23,578 subscribers in August 2004; 23,282 subscribers in mid-2006).

³⁴ Petition at 2-4, 8.

comparable to larger systems in the areas of equipment purchasing and program acquisition.³⁵ It wishes to devote its finite resources instead to customer service, technological advancement, and careful cost control in order to compete against larger firms such as EchoStar and DirecTV.³⁶

III. DISCUSSION

10. Criteria for Small Systems Petitions. As noted above, WaveDivision's parent has fewer than the maximum subscribership for small cable companies, but its Port Orchard system exceeds the maximum subscribership for small cable systems. WaveDivision has demonstrated that, except for its subscriber count, the Port Orchard cable system substantially shares all the relevant characteristics of small cable systems. The Port Orchard system averages significantly fewer subscribers per mile than the average small system. In addition, the Port Orchard system's average annual premium revenue per subscriber is slightly above the average for small systems but far below the average premium revenue for large systems. Finally, the Port Orchard cable system's average monthly regulated revenue per channel per subscriber is much closer to that of small systems than to that of systems with more than 15,000 subscribers. Given the totality of the circumstances, we find that WaveDivision has demonstrated that its Port Orchard system resembles a small system according to most of the applicable criteria.

11. Under Section 76.7(a)(4)(i) of the Commission's rules, a petition for special relief must state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the requested relief and to support a decision that such relief would serve the public interest.³⁷ WaveDivision has adequately established the Port Orchard system's need for the relief as required by Section 76.7(a)(4)(i). In making this finding, we note that the Commission's decision to target relief to small systems owned by operators with fewer than 400,000 subscribers was based on a recognition that the then-existing rate rules did not sufficiently take into account the higher costs of business faced by smaller companies.³⁸ In addition, the Commission acknowledged that qualifying systems and companies were in need of relief from the procedural burdens imposed upon such entities by the other forms of rate regulation.³⁹ The Commission found that alleviating the substantive and procedural burdens associated with the standard benchmark and cost-of-service methodologies "should free up resources that affected operators currently devote to complying with existing regulations and should enhance those operators' ability to attract capital, thus enabling them to achieve the goals of Congress," as set forth in the 1992 Cable Act.⁴⁰ Given that we have found that the Port Orchard system is entitled to small system treatment, granting the Petition will serve the congressional goals identified in the *Small System Order* and will thus be in the public interest.

12. Scope of Waiver. The Port Orchard system exceeds 15,000 subscribers and, although it has lost subscribers since 2004, we cannot presume that the system will not grow in the future. Therefore, we will place a limit on the duration of this waiver. In the absence of a limit on the waiver's duration, the system would enjoy small system status indefinitely, regardless of its eventual size. Such a result would

³⁵ *Id.* at 9.

³⁶ *Id.* at 2.

³⁷ 47 C.F.R. § 76.7(a)(4) (i).

³⁸ *Small System Order*, 10 FCC Rcd at 7420 ¶¶ 55-56.

³⁹ *Id.*

⁴⁰ *Id.* at 7407 ¶ 26, citing the 1992 Cable Act.

be inconsistent with the goal of creating rate regulatory relief for systems that need such relief due to their relatively small subscriber base.

13. We conclude that the Port Orchard waiver will terminate four years from the date of this order, unless extended further, subject to the conditions set forth below. We believe the four-year limit will afford Port Orchard adequate regulatory certainty for the foreseeable future, while ensuring that the system is not permitted to charge rates indefinitely under a scheme designed for smaller systems. This is the same period that we chose in our last decision extending small system status to a cable system.⁴¹ We believe the same waiver period is appropriate here. The data about the Port Orchard cable system in 2004 and 2006 show stability and no trend away from having most characteristics of a small system. We see no reason to require the operator of such a system to file petitions seeking special relief any more often than necessary. If Port Orchard's critical characteristics have undergone little further change at the expiration of the four-year period, WaveDivision may seek another finding of continued eligibility for small system treatment by filing another petition for relief with the Commission.

14. In any franchise area where the system is currently subject to regulation, Port Orchard may reestablish its maximum permitted rates by filing Form 1230 at any time in the next four years.⁴² Where the system is not currently subject to regulation but, within the next four years, becomes subject to regulation, Port Orchard may file Form 1230 within the usual response time.⁴³

15. After filing Form 1230 and providing the requisite 30 days' notice for rate increases, Port Orchard may set its rate at any level that does not exceed the maximum rate generated by the form, subject to the standard rate review process. Subsequent increases (also not to exceed the maximum rate established by Form 1230) shall be permitted upon 30 days' notice, but are not subject to further regulatory review.⁴⁴ If Port Orchard reaches the maximum rate established by Form 1230, and subsequently wishes to raise rates further, it must justify the rate increase in accordance with our standard benchmark or cost-of-service rules.

IV. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the Petition for Special Relief filed by WaveDivision Holdings, LLC, requesting a waiver of the Commission rules defining systems subject to small system rate relief, IS GRANTED, with respect to its Port Orchard cable system for a period of four years.

17. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.⁴⁵

⁴¹ *Northland*, 19 FCC Rcd at 2767 ¶ 14.

⁴² Upon the filing of Form 1230, the Commission's rules permitting a certified local franchising authority to review the proposed rates, to request additional information, and to toll the effective date of the proposed rates, will then apply. See *Small System Order*, 10 FCC Rcd at 7424 ¶ 64; see also 47 C.F.R. Part 76, Subpart T (Notices); 47 U.S.C. § 552.

⁴³ See 47 C.F.R. § 76.934 (c)(3).

⁴⁴ *Small System Order*, 10 FCC Rcd at 7426 ¶ 69. Under the small system rules, rate increases taken after the initial Form 1230 has been approved are not subject to further regulatory review, so long as the rate is no higher than the initial Form 1230's maximum permitted rate. *Id.*

⁴⁵ 47 C.F.R. § 0.283.

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